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CITATIONS





410-535—70——1

Cases—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 107

HAZEL PALMER, ET AL., PETITIONERS

*v.*

ALLEN C. THOMPSON, MAYOR, CITY OF JACKSON, ET. AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### OPINIONS BELOW

The opinions of the court of appeals on rehearing *en banc* (A 44–73) are reported at 419 F. 2d 1222. The opinion of the three-judge panel (A 34–43) is reported at 391 F. 2d 324. The letter opinion, findings of fact and conclusions of law of the district court (A 23–31) are not reported.

### JURISDICTION

The judgment of the court of appeals *en banc* (A 74) was entered on October 9, 1969. The petition for a writ of certiorari was filed on March 7, 1970, and was granted on April 20, 1970. 397 U.S. 1035. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a municipality's closure of all of its public swimming facilities, in order to avoid their racial desegregation, is prohibited by the Fourteenth Amendment.

## INTEREST OF THE UNITED STATES

The United States has a continuing obligation under Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b, and under the Fourteenth Amendment, to protect individuals against denial of equal use of state-owned or state-operated public facilities on account of race or color. This Court's decision in this case is likely to affect the government's responsibilities and the success of its efforts in this area.

## STATEMENT

Prior to commencement of this action, the City of Jackson, Mississippi, operated five public swimming pools. Four of them were maintained for the exclusive use of whites, and the fifth was maintained exclusively for the use of Negroes (A 8–10). The four white pools were located in municipal parks with a combined area of approximately 555 acres (A 8–10). The sole Negro pool was located in a park for Negroes comprising 33 acres (A 9). Additional facilities, including auditoriums (A 9) and golf courses (A 10), were also maintained by the city on a racially segregated basis.

In 1962, three Negro plaintiffs initiated a class action in the United States District Court for the Southern District of Mississippi, seeking to enjoin

city officials from enforcing state statutes requiring racial segregation in public recreational facilities. The district court held that the suit was not a proper class action and limited relief to a declaratory judgment in favor of plaintiffs' personal claims of right to unsegregated use of the city's public recreational facilities. *Clark* v. *Thompson*, 206 F. Supp. 539 (S.D. Miss.), affirmed *per curiam*, 313 F. 2d 637 (C.A. 5), certiorari denied, 375 U.S. 951. In response to that decision, the city closed all municipal swimming pools, an action which the mayor much later explained in the following manner (A 21):

> Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

In August 1965, the present action was commenced against the mayor and other city officials, seeking a temporary restraining order.[1] The district court denied relief (A 31) on September 15, 1965, and, on March 26, 1966, the court entered a final judgment dismissing

[1] Questions regarding alleged racial discrimination with respect to the use of other public facilities were raised below but were not presented to this Court.

petitioners' complaint with prejudice (A 33). That judgment was affirmed by a panel of the court of appeals on August 29, 1967 (A 34); on October 9, 1969, on rehearing *en banc*, it was again affirmed (A 44), six judges dissenting (A 56).

## SUMMARY OF ARGUMENT

This Court has recognized that, even though equally applicable to all persons regardless of race, state action which authorizes or invites racial discrimination, or, alternatively, which has as its purpose or effect racial segregation, may constitute a denial of equal protection of the laws. Both situations exist in the present case. The city's closing of the pools in response to the integration order and its explanation that interracial swimming cannot be safely or economically permitted imply to private owners in the vicinity that their swimming pools should be operated on a racially discriminatory basis. Moreover, the clear purpose and effect of the municipality's action, coming on the heels of the court order, is to prevent commingling of the races at these public facilities, thereby depriving the city's citizens of an opportunity to be accepted without regard to race in the use of municipal swimming pools. Thus, the citizens of the City of Jackson are no less segregated now than when dual facilities were maintained.

The justification proffered by the city for its action is constitutionally inadequate. Official predictions of physical violence likely to result if the swimming pools are integrated are no more than personal speculations. Nor is there anything in the record to sup-

port the assertion that compliance with the integration order would be uneconomical. While considerations of safety and economy may well sustain the temporary closing of some facilities to ensure prompt, orderly achievement of desegregation, no such showing has been, or indeed can be, made in the present case. There simply is no overriding state interest to justify the complete closure of all municipal swimming facilities in order to avoid their desegregation—which constituted state action impermissibly based on race.

## ARGUMENT

1. The closing of public recreational facilities is undeniably state action; in the present case, the focus is on a decision made and implemented by municipal officials to close swimming pools that were owned or leased by the City of Jackson, Mississippi, and city-operated. The action of the municipality was essentially a negative one—*i.e.*, ceasing to provide a benefit which it had traditionally provided for its citizens. Thus, there is posed at the outset the question whether such action may be immune *per se* from constitutional scrutiny. Is a state, regardless of circumstance, always free to withdraw from an activity it has traditionally undertaken so long as there exists no constitutional obligation initially to undertake that activity or provide the particular service or benefit? This Court's decisions clearly indicate that it is not.

For example, in *Griffin* v. *County School Board*, 377 U.S. 218, this Court reviewed a decision by a political subdivision of the state to close all public

schools within its jurisdiction. In the circumstances of that state action—including the availability to white students of state-assisted private schools and the unavailability of such schools to black students (*id.* at 230, 232), the furnishing of public schools to students in all other counties of the state (*id.* at 225), and the overriding purpose of the county officials to avoid court-ordered desegregation (*id.* at 231, 232)—closing the county's public schools, even though that act was, as here, a negative one, was held to violate the Fourteenth Amendment. Thus, the county was not permitted to withdraw completely from affording public education to its citizens (*id.* at 225, 232), nor was the state allowed to sanction efforts by the county to do so (*id.* at 229).

Similarly, in *Reitman* v. *Mulkey,* 387 U.S. 369, the state's effective repeal, by constitutional amendment adopted in a popular referendum, of legislation prohibiting racial discrimination in housing was held by this Court to violate the Fourteenth Amendment in the circumstances of that case (namely, that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market," *id.* at 381)—notwithstanding that the state was never constitutionally required to enact such legislation (*id.* at 376). And see, *e.g., Green* v. *County School Board,* 391 U.S. 430; *Garrity* v. *New Jersey,* 385 U.S. 493; *Slochower* v. *Board of Higher Education,* 350 U.S. 551, 559; *Keyes* v. *School District No. 1, Denver,* 313 F. Supp. 61 (D. Colo.).

It follows, as the court below unanimously held, that the city's closure of public recreational facilities in this case may properly be subjected to constitutional scrutiny under the equal protection clause of the Fourteenth Amendment.[2]

2. We turn, then, to the central issue in this litigation—whether the city's refusal to provide integrated public swimming facilities is racially discriminatory. Respondents insist that this Court need look no fur-

[2] The closing of public facilities is not an uncommon response to a duty to discontinue racially dual systems. Three *amici* in this case were plaintiffs in separate lawsuits initiated to desegregate public swimming pools in Greenwood, Canton, and Edwards, Mississippi; a fourth *amicus* is the mother of a boy who sought to integrate a swimming pool in West Point, Mississippi. In each instance, the facilities were closed. The opinions of the court below (A 72 n. 14, n. 2, 73) indicate that the Montgomery, Alabama, city parks were shut down to avoid integration in 1959; although they were reopened in 1965, "visitors to Montgomery's parks will find no animals in the City Zoo and no water in the public swimming pools" (App. 73). See *City of Montgomery, Ala.* v. *Gilmore*, 277 F. 2d 364 (C.A. 5). See, also, *Clark* v. *Flory*, 237 F. 2d 597 (C.A. 4) (park closed by state statute); *Tonkins* v. *City of Greensboro, N.C.*, 276 F. 2d 890 (C.A. 4) (*per curiam*) (municipal swimming pool closure). In response to a lawsuit seeking a freedom of choice school desegregation plan, the Commission Council of Plaquemines Parish, Louisiana, stopped financing the public school system; building programs were stopped; facilities were closed; public school property was allowed to be transferred to private, segregated schools; educational programs that had traditionally been offered only to white students were discontinued and denied to all. See *Plaquemines Parish Commission Council* v. *United States*, 415 F. 2d 817 (C.A. 5). See, also, *Griffin* v. *County School Board*, *supra*; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515 (per curiam). Cf. *Evans* v. *Abney*, 396 U.S. 435.

ther than the act itself, that the closing of all five swimming pools treats whites and Negroes alike, prohibiting the use of municipal facilities to all persons regardless of race. This Court has, however, explicitly recognized that state action having an appearance of racial neutrality or racially equal application can nevertheless be invidiously discriminatory (a) where the state action invites or authorizes private discrimination, or (b) where the state action has the purpose or effect of producing racial segregation. Both of these factors appear to be present in this case.

A. Where state action, though racially neutral, authorizes, invites or encourages racial discrimination by private individuals, it may constitute a denial of equal protection of the laws. Thus, in *Anderson* v. *Martin*, 375 U.S. 399, the state required designation in state and local elections of every candidate's race on the ballots. This Court found unpersuasive the state's contention "that its Act is nondiscriminatory because the labeling provision applies equally to Negro and white" (375 U.S. at 403–404), so that racially motivated voting, if indeed it occurred, might work to the detriment of white as well as Negro candidates (*id.* at 402):

> In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group

> because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines.

And in *Reitman* v. *Mulkey,* 387 U.S. 369, the Court considered a permissive state constitutional provision conferring absolute discretion on owners of real property to convey, or decline to convey, their property; the provision replaced an open-housing statute. It was held that the constitutional provision constituted "an authorization to discriminate" (*id.* at 379) and therefore violated the equal protection clause. In essence, as the Court there observed, "[t]he right to discriminate, including the right to discriminate on racial grounds, was * * * embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." *Id.* at 377. See, also, *Lombard* v. *Louisiana,* 373 U.S. 267; *Robinson* v. *Florida,* 378 U.S. 153.

Similar authorization and encouragement of discrimination is implicit in the instant case. The record clearly reflects that, but for the city's inability to continue to operate its public facilities on a racially segregated basis, the city swimming pools would not have been closed. The district court found (A 28) that the city's closing of all municipal pools was in response to a declaratory judgment prohibiting con-

tinued racial segregation. See *Clark* v. *Thompson*, 206 F. Supp. 539 (S.D. Miss.), affirmed *per curiam*, 313 F. 2d 637 (C.A. 5), certiorari denied, 375 U.S. 951. The city's Director of the Department of Parks and Recreation averred that "after the decision of the Court in the case of *Clark* v. *Thompson*, it became apparent that the swimming pools owned and operated by the City of Jackson could not be operated peacefully, safely, or economically on an integrated basis * * *" (A 18). In an affidavit filed in the district court, the mayor of the city also stated (A 21) that the swimming facilities could not be operated "on an integrated basis" (A 21), for two reasons:

> [T]he personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and * * * the said pools could not be operated economically on an integrated basis. * * *

While nothing in the action actually taken, or in the municipality's reasons therefor, explicitly requires private discrimination, the official message here seems comparably clear to those involved in the *Anderson*, *Reitman*, *Lombard*, and *Robinson* cases—interracial swimming cannot be safely or economically permitted. Insofar as privately owned swimming pools may be operated in the city as public accommodations, as private clubs, or simply for the personal use of the owner and his guests, operating them on a racially discriminatory basis would seem to have been advised by the city—advised with an even greater

emphasis than had been inherent in the city's previous example of operating its pools on a segregated basis.[3] For the city's admonition that swimming pools cannot be made available for use except on a racially segregated basis without endangering the safety of the users or the economic basis of the operation extends equally to them. In short, "[t]hose practicing racial discriminations need no longer rely solely on their personal choice." *Reitman* v. *Mulkey*, 387 U.S. at 377.[4] See, also, *Bates* v. *City of Little Rock*, 361 U.S. 516, 524; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463.

Indeed, "[o]ne pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis" (A 52 n. 12; see *id.* at 5), though the causal connection between that private discrimination and the city's stand against interracial swimming is unclear from the record. Nor does the record reflect the extent to which private pool-owners (other than the YMCA) have in fact discriminated on a racial basis in response to the city's action. This, however, is in-

[3] We note that in the past municipal officials have, with respect to these and other facilities available to the public, invited voluntary racial segregation. *Clark* v. *Thompson*, 206 F. Supp. 539, 541 (S.D. Miss.) (recreational facilities); *United States* v. *City of Jackson*, 206 F. Supp. 45, 47 (S.D. Miss.), reversed, 318 F. 2d 1, 5 (C.A. 5) (common carrier terminals); see *Bailey* v. *Patterson*, 199 F. Supp. 595, 611 (S.D. Miss.), vacated, 369 U.S. 31.

[4] It is, of course, long settled that the equal protection clause forbids official action which injures the Negro by implying his unfitness or inferiority as a class, thereby encouraging private racial prejudice. See *Strauder* v. *West Virginia*, 100 U.S. 303, 308; *Brown* v. *Board of Education*, 347 U.S. 483, 494.

consequential; if the city's action constitutes an invitation or authorization to discriminate, no instance or pattern or practice of private discrimination and no causal connection between such discrimination and the official action need be shown. The record in *Anderson*, for example, contained no evidence that any voter had voted on a racial basis, and there was no showing in *Reitman* of a cause-in-fact relationship between the provable acts of private discrimination (which occurred prior to adoption of the constitutional amendment) and the state action.

B. The city's action is also discriminatory in another way. Where a city traditionally maintains facilities upon which its citizens reasonably rely for enjoyment of ordinary amenities of life, to close those facilities rather than integrate them effectively deprives the citizens of an opportunity to commingle with others and thus, to the extent that the closed facilities would otherwise have promoted such commingling, erects a positive barrier to racial integration.

This Court has emphatically held that the Fourteenth Amendment prohibits a state from preventing or deterring on a racial basis the free, interracial association of individuals—even if it does so by means of a law which applies equally to those of all races. *Loving* v. *Virginia*, 388 U.S. 1. The closing of the city's segregated swimming pools in the present case, concededly in order to avoid their integration, constitutes state action premised on no less a racial classification than was involved in the anti-miscegenation law held unconstitutional in *Loving*. Indeed, the pe-

culiar timing and all-inclusiveness of the decision to close the pools is reminiscent of the "uncouth twenty-eight-sided figure" utilized in *Gomillion* v. *Lightfoot,* 364 U.S. 339, 340, as a barrier to racial integration. See *id.* at 349 (Mr. Justice Whittaker, concurring).

Also instructive here is this Court's decision in *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637, in which the state had placed restrictions upon students to prevent their interracial association while participating in activities of the state university. The issue in *McLaurin* was whether a Negro student had been denied equal protection of the laws where he was set apart from white students by reserving for him special classroom, cafeteria, and library seats. The Court held that the state could not constitutionally prevent students' intellectual commingling nor deny students the opportunity to be accepted on a nonracial basis (339 U.S. at 641–642):

> It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. *Shelley* v. *Kraemer,* 334 U.S. 1, 13–14 (1948). The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.

In the instant case, the city comparably deprived its citizens of the opportunity to be accepted without regard to race in the use of municipal swimming facilities;[5] the citizens are no less segregated now than when dual facilities were maintained.

Moreover, to the extent that the municipality had voluntarily undertaken to provide swimming facilities for its citizens, making it unnecessary for the private sector to develop equally adequate facilities,[6] the closing of the pools has insured that racial segregation will be perpetuated. The constitutional harm is not merely that the city declined to provide an opportunity for racial integration; having invited reliance by the citizenry on the municipality for recreation, the city has erected a barrier to integration by closing facilities it had long maintained when they could no longer be operated on a segregated basis.[7]

[5] While *McLaurin* did emphasize the educational disadvantages of segregated education and a correlative impediment to fulfilling society's need for trained leaders, 339 U.S. 641, the educational context of *McLaurin* would not seem to distinguish it from the recreational context of this case. Compare *Brown* v. *Board of Education*, 347 U.S. 483, 493, with *Mayor & City Council of Baltimore* v. *Dawson*, 350 U.S. 877.

[6] That voluntarily undertaking to provide a service for another should produce a special relationship with special duties is no novel legal doctrine. For example, although not initially obligated to provide medical care, having undertaken to do so, a physician may not abandon his patient. *E.g.*, *Andrews* v. *Coulter*, 163 Wash. 429, 433, 1 P. 2d 320, 321. See, also, Restatement, Second, *Torts* § 324 (voluntary rescue), § 323 (undertaking to perform general services), § 362 (landlord's gratuitous repairs).

[7] The record suggests that closure of the public facilities in this case, as in *Griffin* v. *County School Board*, 377 U.S. 218,

In the circumstances of this case, the removal of public facilities from public use does not itself constitute the full extent to which segregation will be perpetuated. The city has also invited private discrimination, as earlier indicated, and has admonished its citizens of the dangers of interracial swimming. Thus, insofar as the city's policy is adopted by the private sector, the lines of racial segregation will be drawn more sharply.

Finally, while it is impossible to measure the degree to which the municipal action may deter others from asserting their constitutional right not to be segregated by race in the use of public facilities, that potential is clearly presented by the facts of this case. For the Negro citizens of Jackson, Mississippi, have been presented a Hobson's choice—"the thing offered or nothing":[8] Acquiesce in segregated facilities or lose those designated for your race. As Judge Wisdom, in dissent, described the predicament (A 71–72):

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230, bears more heavily on Negroes than on whites inasmuch as a private organization has assumed operation of one of the swimming pools, apparently making it available to all members of the public who are white, while the record does not suggest that such a facility is available to Negroes (A 5–6, 28, 52 n. 12, 61–62). Like the private schools in *Griffin*, *id.* at 230, 231, 232, that facility might be said to be city-supported. See *Evans* v. *Newton*, 382 U.S. 296; *Pennsylvania* v. *Board of Directors*, 353 U.S. 230. Unlike *Griffin*, *id.* at 225, the record does not indicate the availability of swimming facilities in other areas of the state (A 51). But the final element of discrimination found in *Griffin*—perpetuation of racial segregation (*id.* at 231, 232)—is as clearly present here.

[8] Webster's New Collegiate Dictionary 393 (2d ed.).

> In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempt to desegregate these facilities.

This choice tends to perpetuate segregation by discouraging the assertion of constitutional rights; such discouragement is in itself constitutionally proscribed. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 486–487; *Shapiro* v. *Thompson,* 394 U.S. 618, 631. Cf. *Textile Workers* v. *Darlington Mfg. Co.,* 380 U.S. 263.

3. Ordinarily, a state need only show a rational relationship to a proper state purpose to justify its action under the equal protection clause. See, *e.g., Dandridge* v. *Williams,* 397 U.S. 471; *Walters* v. *St. Louis,* 347 U.S. 231, 237–238; *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552, 564. But "an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race * * * bears a heavy burden of justification * * * and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida,* 379 U.S. 184, 196; see *Loving* v. *Virginia,* 388 U.S. 1.

The justification proffered by the city for its action was that public swimming pools could not be operated safely or economically on an integrated basis (see *supra*, pp. 3, 9–10). This Court rejected essentially identical justifications for racial discrimination in residential areas (*Buchanan* v. *Warley*, 245 U.S. 60), public schools (*Cooper* v. *Aaron*, 358 U.S. 1; cf. (*Monroe* v. *Board of Commissioners*, 391 U.S. 450), and public recreational facilities (*Watson* v. *Memphis*, 373 U.S. 526). The conclusions of *Watson* are apposite here, and merit quoting at some length (373 U.S. at 535–537):

> The city asserted in the court below, and states here, that its good faith in attempting to comply with the requirements of the Constitution is not in issue, and contends that gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil. The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise. * * *
>
> Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful. * * *

> The other justifications for delay urged by the city or relied upon by the courts below are no more substantial, either legally or practically. It was, for example, asserted that immediate desegregation of playgrounds and parks would deprive a number of children—both Negro and white—of recreational facilities; this contention was apparently based on the premise that a number of such facilities would have to be closed because of the inadequacy of the "present" park budget to provide additional "supervision" assumed to be necessary to operate unsegregated playgrounds. As already noted, however, there is no warrant in this record for assuming that such added supervision would, in fact, be required, much less that police and recreation personnel would be unavailable to meet such needs if they should arise. More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. * * * [Footnotes omitted.]

There is likewise no reason here to suppose that official predictions of the dangers of interracial swimming are more than "personal speculations." Indeed, as in *Watson,* other public facilities in the city have been desegregated apparently without endangering public safety or the public fisc (see A 21). To be sure, conversion from a racially segregated to an integrated public facility may in some circumstances require

public officials to consider problems related to safety and economy. Even where such problems are not necessarily speculative (see *Cooper* v. *Aaron, supra*), this Court's decision in *Watson* seems to require at least that the solution be carefully tailored to the problem.

It might well be permissible in some circumstances for a municipality to close temporarily some facilities if the object is to ensure the prompt, orderly achievement of desegregation. The court below may be correct that the city "had considerable discretion as to how that transition could best be accomplished" (A 49); however, no such proper objective was sought here. In the words of the mayor, "[t]he City * * * decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools" (A 21).

We accept, *arguendo,* "the absolute right" of the private citizen "at all times, to permanently close and go out of business * * * for whatever reason he may choose * * *," *Labor Board* v. *New Madrid Mfg. Co.,* 215 F. 2d 908, 914 (C.A. 8), cited in *Textile Workers* v. *Darlington Mfg. Co.,* 380 U.S. 263, 271; see, also, *Evans* v. *Abney,* 396 U.S. 435. But the state has no such inherent right, and, accordingly, the city's action here cannot be justified on such a basis. For the reasons previously stated, it constitutes an invidious discrimination prohibited by the Fourteenth Amendment.

## CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted.

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